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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1970~~

No. ~~5013~~ No. 70-5013

RUDOLPH JOHNSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for a Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1970

No. 5721

RUDOLPH JOHNSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for a Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is improperly invoked by the Petitioner. Since the issue of jurisdiction is closely related to the factual circumstances of this case, the jurisdictional issues will be considered in conjunction with the substantive issues in the Reasons For Denying The Writ.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a petitioner who has succeeded in suppressing a pre-indictment identification on the grounds that he was not represented by counsel may assert that the application of *Wade* in Illinois only to post-indictment lineups has deprived him of his right to counsel at a critical stage?

2. Whether this case presents a proper record for the resolution of any issues relating to evidence seized from the petitioner and admitted into evidence against him at trial?

STATEMENT OF THE CASE

On the evening of March 4, 1967, at about 8:10 P.M., Barbara Green, her sister Bernice Johnson and Mrs. Johnson's two small daughters were walking along Elizabeth Street between Throop and 64th Streets in Chicago. A Negro male, armed with a gun, came up behind the two women, stopped them, and stated: "This is a stickup. If you holler, I will kill you." (A. 12, 15). The man stuttered.

Apart from the speech impediment, neither woman noticed any distinguishing characteristic of the assailant. (A. 28, 30). They furnished police with a general description of the man's height, weight, age and race, and further, that he wore a dark, three-quarter length coat, a scarf pulled up around his mouth, and a knit hat pulled down around his eyes, almost completely obscuring his face. (A. 12, 15-16).

Barbara Green was asked to view several suspects and listen to them speak on March 11, 1967. She identified no one. (A. 13).

Dating from October of 1966, there had been a series of robberies in the area of the Green-Johnson occurrence. From information furnished police by the women upon whom the robber preyed, the department had developed a composite drawing of the suspect. (A. 9). On June 23, 1967 (after the robbery which is the subject of the instant petition), another robbery in the series was committed at 1302 West 64th Street. The brother of the victim chased the offender to the 6300 block on South Elizabeth, where the robber disappeared. (A. 18).

Contemporaneous to this escape, Mrs. White, a resident of the 6300 block of South Elizabeth was walking her dog in the neighborhood. She witnessed part of the chase and recognized the robber as a tenant residing at 6341 South Elizabeth. She did not know his name but informed police on July 4, 1967, that the man was Rudolph Johnson and that he lived on the second floor at the 6341 address.

The police interviewed the wife of Johnson's landlord on July 5, 1967. She gave the police a general description of Johnson. (A. 19). The officers returned the following day to interview the landlord, Rev. Jackson, who was not at home on July 5. When Rev. Jackson and his wife were shown the composite sketch of the suspected robber, they each thought that it bore a resemblance to the man occupying the apartment on the second floor—Rudolph Johnson. (A. 19).

Following this tentative identification, the police officers proceeded to Johnson's apartment, arriving about 5:30 P.M., and knocked at the door. No one answered the

knock. The officers then decided to wait for the tenant to return. At about 8:30 P.M. that evening, a man entered the second-floor apartment.

The police then approached the apartment, knocked at the door, and petitioner Johnson answered the knock, admitting the police to the apartment. Noting the similarity between the physical description given by the various victims (including Barbara Green and Bernice Johnson) of the robber, the composite drawing of the suspect, and the man occupying the second floor apartment (who stuttered), the police arrested the petitioner.

After being informed of his rights by the arresting officers, Johnson responded: "Eventually, you were going to catch me, I'm glad it's now . . . I have been hiding a long time." (Pet.'s Br. Appendix 2a). Upon being cautioned a second time of his right to have counsel present when speaking to the police, petitioner stated that he did not want a lawyer, "I just want to tell the truth." (A. 19). The police then searched petitioner's apartment, recovering various articles of property reported stolen in several armed robberies in the area. He was taken to the police station and placed in a lineup that evening. According to petitioner's testimony on the motion to suppress, he requested the presence of counsel at the lineup but was told by police that counsel could not be appointed until later. (A. 22).

On the following day, Barbara Green and Mrs. Johnson were brought to the station. Each woman identified certain articles taken during the March 4 robbery. (A. 13, 16). Five men of similar stature and appearance then were brought before the two women. (A. 23). Bernice Johnson requested one of the detectives to have each of the five say, "'Uh, uh, uh, if you holler I will kill you,'

and stutter when he said it." (A. 16). After listening to each of the men speak, both women identified petitioner Johnson as the man who had robbed them. (A. 13, 16).

Upon being identified, Johnson said: "I remember these two young ladies . . . She had two kids with her the night I robbed her. [referring to Bernice Johnson] . . . I I didn't touch you, did I, Miss?" (A. 16).

On July 19, 1967, a series of indictments were returned against the petitioner by the grand jury, including the armed robbery charge which is the subject of the instant petition. The Public Defender of Cook County was appointed to represent Johnson at trial. Counsel filed motions to suppress the various admissions made by Johnson, both in his apartment and at the police station; the lineup identification of petitioner; the in-court identification of petitioner; and the physical evidence seized from Johnson at the time of his arrest. (A. 24-25).

The trial court granted the motion to suppress the identification at the lineup because of the failure of the police to warn the petitioner of his right to counsel at the lineup. (A. 24). All other motions to suppress were denied. (A. 25).

At trial, after selection of a jury, Barbara Green testified for the State, identifying the petitioner as the man who robbed her and her sister on the evening of March 4, 1967, and also identifying various articles found by police in petitioner's apartment as items belonging to her which were taken during the course of that robbery. (A. 26-27).

Bernice Johnson also identified Rudolph Johnson as the robber and several items introduced into evidence by the State as belonging to his sister, Barbara Green. (A. 30).

Officer Nesis, one of the arresting officers, testified that he had never seen Johnson before the time of the arrest. (A. 31). He testified that on July 6, 1967, at approximately 8:30 P.M., he and Detective Durkee (who was on leave at the time of the trial and was never called to testify) knocked on the door to petitioner's apartment. Johnson opened the door, at which time "Detective Durkee and I seen that Johnson fit the description of the person wanted for these crimes." (A. 31). At the time of the arrest, he noted that Johnson stuttered. (A. 31). He also testified that he overheard a conversation between the petition and three police officers at the police station shortly after petitioner's arrest during which Johnson admitted the robberies, but denied his guilt as to the rape charges. (A. 31). The objection to the witness's reference to other crimes was sustained. (A. 31).

Officer Butz identified Rudolph Johnson as the man he saw arrested the evening of July 6, 1967, and then testified that he searched petitioner's apartment, where he first saw the articles which Barbara Green later identified as belongings stolen from her on March 4, 1967. (A. 32). He also testified that he heard Detective Durkee question Johnson at the police station and that during the questioning Johnson admitted that the items taken from the apartment by the police at the time of his arrest did not belong either to his wife or him. (A. 33). When again asked if he wished to have a lawyer present, Johnson said no, "I know it was just a matter of time, that you were going to catch me . . . I'm glad it's over with . . . How can I help myself?" (A. 33). On cross examination, the witness testified that there was no arrest or search warrant issued in this case. (A. 33).

Officer Brasky testified that he first saw Rudolph Johnson on July 6, 1967, at the time of Johnson's arrest

in his apartment. (A. 33). People's Exhibits one through five (exhibit one being the three -quarter length coat belonging to Johnson and worn by him at the time of the robbery, exhibits two, three, four and five being articles belonging to Barbara Green and identified by her as having been stolen during the March 4, 1967, robbery) were admitted into evidence. (A. 34). Whereupon, the State rested.

The petitioner's counsel, the Public Defender, then moved to suppress the in-court identification of the petitioner by Barbara Green and Bernice Johnson because the "State hasn't met their burden to show by clear and convincing evidence that the testimony of these witnesses was not induced by the intervening lineup procedures . . . ." (A. 34). In the alternative, the defense moved to introduce the evidence of the prior lineup and the procedures followed therein. (A. 34). This evidence had been suppressed prior to trial upon the defense's own motion. (A. 24). The trial court denied both of defense counsel's motions. (A. 34).

The defense then put on four witnesses—the petitioner's wife, grandmother, mother, and step-father—who testified as to Johnson's character and reputation. (A. 34-35). The defense offered no other evidence.

The jury being unable to reach a verdict, the judge declared a mistrial. The defense then waived a jury and requested a stipulation that the evidence on the second trial (before the same judge) would be the same as that presented at the first trial. (A. 35-36).

Rudolph Johnson was found guilty of armed robbery by the court without a jury and sentenced to 3 to 7 years imprisonment to be served concurrently with sentences imposed upon other indictments. Upon appeal to the Su-

preme Court of Illinois, this conviction was affirmed. He now seeks the review of this Court by petitioning for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

A PETITIONER WHO HAS SUCCEEDED IN SUPPRESSING A PRE-INDICTMENT IDENTIFICATION ON THE GROUNDS THAT HE WAS NOT REPRESENTED BY COUNSEL IS PRECLUDED FROM ASSERTING THAT THE APPLICATION OF WADE ONLY TO POST-INDICTMENT LINEUPS HAS DEPRIVED HIM OF HIS RIGHT TO COUNSEL AT A CRITICAL STAGE.

The petitioner argues that the application of *United States* v. *Wade*, 388 U.S. 218 (1967) only to post-indictment lineups has deprived him of his right to counsel at a critical stage of the criminal proceedings against him—the pre-indictment lineup.[1] The petitioner,

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1. This issue is distinct from the question of whether there was an actual lineup identification in this case. As the petitioner himself reiterates throughout his brief, Rudolph Johnson was identified solely upon the basis of a voice identification. Although the record reflects a traditional lineup situation, petitioner admits that the witnesses really found the voice determinative and could have made the same identification without actually viewing the suspects. In such a situation, the petitioner would have no right to have counsel present at the voice identification, *United States* v. *Wade*, 388 U.S. 218 (1967), and consequently the application of the *Wade* rule to a pre-indictment lineup again would not be at issue.

however, is completely without standing to present such an issue. The rules of standing require that a federal question must be raised and *decided adversely* to the petitioner in order to give this Court jurisdiction to hear the question. See: *Campbell Painting Corp.* v. *Reid,* 392 U.S. 286 (1968); *Raley* v. *Ohio,* 360 U.S. 423 (1950); *United States* v. *White,* 322 U.S. 694 (1944). Here, the petitioner successfully sought to have his pre-indictment identification suppressed prior to trial on the basis that he did not have counsel present at the identification. Upon conviction and appeal, he is precluded from contesting the validity of an application of the *Wade* rule which was not made in his case.[2]

This is not to admit, however, that the circumstances of the identification were unduly suggestive, as petitioner seems to infer. In this case, the one outstanding characteristic of the robber was a distinctive mode of speech. In the case of an unusual defendant, the State is not required to search extensively for several similar unusual people from which the witnesses then may make an identification. Here, the State conscientiously attempted to avoid discrepancies among the suspects submitted for identification. As Mrs. Johnson testified, each of the men at the time of identification was asked to repeat, "'Uh, Uh, Uh, if you holler I will kill you,' and stutter when he said it." (A. 16). While each man may not have been a practiced stutterer, the State made the only possible attempt in the circumstances of this case to eliminate discrepancies among the suspects. Any remaining differences were unavoidable. Therefore, the dictates of Stovall v. Denno, 388 U.S. 293 (1967) do not apply. See: State v. Mallette, 267 A. 2d 438 (Conn. 1970); People v. Wilson, 174 N.W. 2d 79 (Mich. App. 1969).

2. Additionally, the Supreme Court of Illinois did not pass on the issue of whether the limitation of the Wade requirement of counsel to post-indictment lineups en-

The only proper issue relating to the identification procedure in this case concerns the validity of the trial court's refusal to allow the defense to utilize the circumstances of the suppressed pre-trial lineup identification in cross examining Mrs. Johnson and Barbara Green after their in-court identifications of petitioner.[3] The defense normally may bring out facts surrounding a prior identification on cross examination of a witness even though such identification had been previously suppressed on the defense's own motion. The State then would have

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unciated in its decision in People v. Palmer, 41 Ill. 2d 571 (1969), was dispositive of the case. In its opinion, the Supreme Court of Illinois stated:

"The State contends, under the authority of our decision in People v. Palmer, 41 Ill. 2d 571, that the Wade-Gilbert rulings are inapplicable since the lineup in this case occurred prior to indictment. The defendant concedes that Palmer is dispositive here, but urges that it be overruled. While defendant challenges the identification under Stovall as well, we are not prepared to find it insufficient and therefore need not discuss the defendant's argument as to Palmer." (Pet's Br. Appendix 7a).

Thus, contrary to petitioner's characterization of the lower court opinion, the court did not uphold petitioner's conviction under the authority of the Palmer case. Indeed, the court specifically stated that it was not dealing with the Palmer argument at all. Since this issue was not raised and passed upon by the Supreme Court of Illinois, this Court is without jurisdiction to decide the question.

3. The propriety of the trial court's ruling on this motion is an evidentiary question which even the petitioner does not attempt to elevate to the level of a constitutional issue. There being no cognizable federal constitutional question presented relating to the identification procedures utilized in this case, certiorari should be denied on this point.

been entitled to elicit any remaining details of the identification from the witnesses on redirect examination. The result of allowing such a course of action in the instant case would have been disastrous for the defense.

Here, the product of eliciting the circumstances of the pre-trial identification would have been the elimination of any doubt of petitioner's guilt. As previously pointed out, even assuming that there was a true lineup situation in this case, the unique characteristics of the suspect do not result in the per se invalidity of the identification procedures utilized by the State on the grounds of impermissible suggestiveness.

Here, the State made every reasonable attempt to mitigate the effect of Johnson's unusual speech pattern. That this attempt was successful and resulted in a proper and accurate identification of the true offender is confirmed by the petitioner's own admission of guilt upon being identified. After Barbara Green and Mrs. Johnson indicated that Johnson was the man who had robbed them at gunpoint, Johnson stated: "I remember these two young ladies . . . She had two kids with her the night I robbed her [referring to Bernice Johnson] . . . I didn't touch you, did I, Miss?" (A. 16). This statement, which would have been brought out upon redirect examination by the State of either Mrs. Johnson or Barbara Green, unequivocally establishes the reliability of each woman's identification.[4] The petitioner admitted his guilt of the robbery. He then substantiated this admission by showing knowledge of particular circumstances, i.e., that Mrs. Johnson

4. The reliability of Barbara Green's identification is further substantiated by her attendance at a previous lineup (which did not include Rudolph Johnson) on March 11, 1967, at which she identified no one. (A. 13).

was accompanied by her two small children at the time of the robbery, which would have been available only to the actual robber. The effect of allowing defense counsel's motion, then, would have been to cement the petitioner's guilt before the jury. That the petitioner actually benefitted from the denial of this motion can be no more vividly reflected than by the failure of the jury in petitioner's first trial (at which the questioned ruling was made) to agree upon a verdict. In such circumstances, where the only effect of a ruling by the trial judge was to exclude unequivocal evidence of the petitioner's guilt, any error in the ruling favored the defendant, and as to him was most certainly harmless beyond a reasonable doubt. See: *Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969); *Gilbert* v. *California*, 388 U.S. 263 (1967) [applying the "harmless error" rule to identification procedures].

II.

THIS CASE DOES NOT PRESENT A PROPER RECORD FOR THE RESOLUTION OF ANY ISSUES RELATING TO EVIDENCE SEIZED FROM THE PETITIONER AND ADMITTED INTO EVIDENCE AGAINST HIM AT TRIAL.

The petitioner casts as his second argument that the record in this case is ideal for the resolution of issues purportedly left undecided by the decision of *Chimel* v. *California*, 395 U.S. 752 (1969). More specifically, petitioner argues that this case presents a proper vehicle for resolving the issues of whether *Chimel* should be given retroactive effect; whether a warrantless and non-consensual entry of a home in a non-emergency situation may

be justified; whether a timed arrest is valid; and finally, whether the search here violated even pre-*Chimel* standards. This fanciful characterization of the record is quickly dispelled by a short reiteration of the relevant facts contained therein.

Prior to trial, petitioner moved to suppress evidence seized during a search of his apartment at the time of arrest, asserting that the search, conducted without a warrant, violated the Fourth Amendment proscription of unreasonable searches and seizures. In support of this theory, the petitioner argued that the police officers timed the arrest to occur inside the apartment, although they had probable cause to arrest him outside, and further, that they forced their entry into petitioner's apartment without consent. The motion to suppress was denied and the evidence seized in the search admitted into evidence at trial. When the jury failed to agree on a verdict, a mistrial was declared. At petitioner's second trial, which resulted in the conviction upon which the instant petition is predicated, the petitioner waived a jury and stipulated that the evidence at the second trial would be the same as the evidence which had been introduced at the first trial. By this stipulation, the petitioner completely waived any objection to the evidence introduced at the prior trial.[5] Having failed to preserve his objections for

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5. This statement is equally true of the argument asserted by petitioner that he was denied counsel at a critical stage of the criminal proceeding against him through the Illinois application of Wade only to post indictment lineups. (See Point I of the instant Brief). However, since petitioner initially lacks standing to present the argument concerning Wade, the first part of this brief treated that initial issue as dispositive. Were such an

the record of the second trial, he is precluded from asserting them before this Court. See: *Kercheval* v. *United States*, 274 U.S. 220 (1927); *United States ex rel. Richardson* v. *McMann*, 408 F. 2d 48 (2nd Cir. 1969); *United States ex rel. Martin* v. *Foy*, 352 F. 2d 418 (2nd Cir. 1965) *cert. den., Martin* v. *Follette*, 384 U.S. 957 (1966); *Glenn* v. *McMann*, 349 F. 2d 1018 (2nd Cir. 1965), *cert. den.* 383 U.S. 915 (1966); *United States ex rel. Staples* v. *Pate*, 332 F. 2d 531 (7th Cir. 1964); *United States* v. *Hetherington*, 279 F. 2d 792 (7th Cir. 1960), *cert. den.*, 364 U.S. 908 (a guilty plea, which is a stipulation of guilt, is a complete and effective waiver of all defects which are not jurisdictional).

Had the petitioner's Fourth Amendment issue been properly preserved, the facts of this case are totally inappropriate for a resolution of the questions which petitioner presents.

The record reflects that from October of 1966 until the petitioner's arrest on July 6, 1967, the police were investigating a series of armed robberies occurring in the Chicago area. The police had a general description of the offender from which a composite sketch had been prepared. The officers knew that the one distinctive feature of the robber was his unusual mode of speech—he stuttered. Until Mrs. White, a resident of the same neighborhood as the petitioner, witnessed the early morning escape of Johnson from the brother of one of his victims, the police had no way of knowing where to concentrate their efforts. However, although Mrs. White did not know pe-

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issue properly presented by Johnson, however, the argument that he has failed to preserve the question by stipulating to the propriety of the evidence introduced at the first trial would apply with equal force.

titioner's name, she did recognize him as a resident of the neighborhood and later supplied police with his name and an address at which she thought the petitioner resided.

Armed with a name, a possible address, and a sketch compiled from numerous descriptions of the assailant, the officers then proceeded to the address—6341 Elizabeth Street—and interviewed the landlord and his wife. Both Rev. and Mrs. Jackson agreed that the composite drawing and verbal description offered by the police "bore a resemblance" to their tenant occupying the second floor apartment.

After interviewing the landlord, the officers immediately proceeded to the second floor apartment to interview Johnson.[6] There was no response to the officers' knock at the apartment door. Anxious to question petitioner, the officers decided to await his return. Up to this point in the time sequence, the police had a general description of the offender, a sketch drawn from a compilation of the descriptions of various victims, and the knowledge

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6. The statement by Officer Butz in the record that "We then decided to take Rudolph Johnson into custody believing we had reasonable grounds to hold him for an investigation of the armed robberties" (A. 19), is not a correct or binding statement of the law. To deprive a citizen of his liberty, a police officer must have probable cause to arrest the person for an offense. Here, the officer admits that he thinks Johnson is a promising suspect but that his determination was to take petitioner into custody to further investigate Johnson's connection with the crimes and not to arrest him on the robbery charge. At this point in the sequence of events, then, the police did not have probable cause to arrest the petitioner and an arrest would have been improper.

that a prime suspect lived in a specified second floor apartment at the 6341 address. The one outstanding characteristic of the offender—his speech impediment—was not identifiable visually. Neither of the arresting officers had seen Johnson prior to the evening of July 6, 1967, when they traveled to petitioner's apartment to interview him.[7] The only objective factor upon which the police could rely was that the suspect occupied the second floor apartment. Thus, the only way in which they could accurately identify a person as the suspect was to wait until he entered the apartment. That is what the officers did.

When Johnson arrived home at 8:30 that evening, the officers allowed him to enter his apartment in order to ascertain that he was in fact Rudolph Johnson. Satisfied of this, the police knocked on the apartment door. Johnson opened the door, admitting the officers to the apartment. At this point, the officers knew that the suspected robber lived in the second floor apartment, that Johnson was occupying that apartment, that Johnson resembled both the general physical description of the offender and the composite drawing of the robber (which fact the officers were able to determine when petitioner opened the door and was clearly visible to them), and, most importantly, that Johnson stuttered.[8] The officers now had probable cause to arrest Johnson on the charge of robbery.

The attempt by petitioner to characterize this as an arrest timed for the purpose of allowing the police to search the apartment ignores the key factor—that the

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7. A. 31, 33.

8. In his testimony at trial, Officer Nesis, one of the arresting officers, stated that at the time of the arrest he noted that Rudolph Johnson stuttered. (A. 31).

police did not have probable cause to arrest the petitioner until he had entered the particular apartment which they knew to be occupied by the suspect. Any arrest of petitioner before he entered the apartment would have been unlawful.

It is well established that the police may conduct a search incident to a lawful arrest. See: *Agnello* v. *United States*, 269 U.S. 20 (1925); *Carroll* v. *United States*, 267 U.S. 132 (1925); *Weeks* v. *United States*, 232 U.S. 383 (1914). Such a search for weapons or evidence of the crime charged is perfectly reasonable both to protect the officer and to preserve evidence which might otherwise be destroyed. See: *Chimel* v. *California*, 395 U.S. 752 (1969); *Terry* v. *Ohio*, 392 U.S. 1 (1968). The only real issue here, then, is the scope of the search which may be conducted.[9]

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9. While petitioner argues that this question necessarily requires the Court to determine whether the decision in Chimel, supra., should be given retroactive effect, the record here reflects that this is an inappropriate case upon which to base such a determination. The petitioner effectively waived his objection to the admission of evidence seized in the search conducted incident to his arrest by requesting a stipulation of evidence at his second trial. Having thus failed to preserve his objection, he is precluded from now asserting the claim before this Court.

Were the issue properly before the Court, a review of the considerations relevant in determining the non-retroactivity of the decision in Mapp v. Ohio, 367 U.S. 643 (1961) prescribes a like resolution of the question of the retroactivity of Chimel. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court considered whether the exclusionary rule enunciated in Mapp should be applied retrospectively. Declining to give the rule such an effect, the Court referred to several factors which are peculiarly

Contrary to petitioner's assertion, the language of this Court's recent decisions indicates that the search of petitioner's apartment in the particular circumstances of this case was proper. In *Vale* v. *Louisiana*, —— U.S. —— (1970), 7 Cr. L. R. 3130, a search of an entire house

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relevant to the issue of the retroactivity of Chimel since the two cases present identical issues—whether a rule requiring the exclusion of evidence seized in violation of the Fourth Amendment should be given retrospective application. These factors are the purpose of the rule of exclusion, the effect of a retrospective application of the rule on the administration of justice and the integrity of the fact-finding process, and the existence or non-existence of the rule prior to the time of the Court's decision giving it explicit approval and application. The Court's reasoning in discussing these factors in Linkletter is equally applicable to Chimel:

> "Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp had already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of Mapp. Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late . . . [T]here are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost . . . To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the admin-

without a warrant was invalidated where the arrest occurred on the front steps of the house:

> "A search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest'. *Shipley* v. *California*, 395 U.S. 818; *Stoner* v. *California*, 376 U.S. 483. If a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, Cf. *Agnello* v. *United States*, 269 U.S. 20, 32, not somewhere outside—whether two blocks away, *James* v. *Louisiana*, 382 U.S. 36, twenty feet away, *Shipley* v. *California*, *supra*, or on the sidewalk near the front steps."

Here, the arrest properly took place inside a small, four room apartment. The incidental search which followed was proper and evidence seized pursuant to the search was properly denied exclusion at trial. See: *Harris* v. *United States*, 331 U.S. 145 (1947).[10]

> istration of justice . . . Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and relevance of which is not questioned and which may well have had no effect on the outcome." (381 U.S. at 636-639).

As the reasoning of the Court in Linkletter is fully applicable to the same issue raised by Chimel, so is the Court's conclusion equally appropriate to each—"After full consideration of all the factors we are not able to say that the Mapp rule requires retrospective application". (381 U.S. at 640).

10. Under the Court's scrutiny of the retroactivity issue in Linkletter, one additional factor weighed in favor of prospective only application of the rule—the prior approval by the Court of the police conduct there at issue. The identical factor is entitled to the same weight in this case.

CONCLUSION

For the foregoing reasons, the Respondent herein respectfully requests that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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